

***United States Court of Appeals
for the Second Circuit***



APPENDIX

*Original with Affidavit
of Mailing*

75-1113

*B
Page 5*

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1113

UNITED STATES OF AMERICA,

Appellee,

—against—

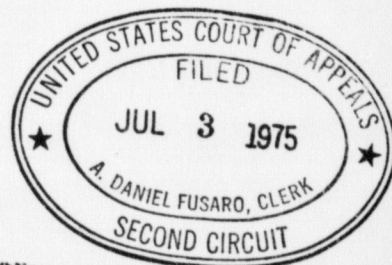
ARIE D. LEVY and NURIEL NURIELI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

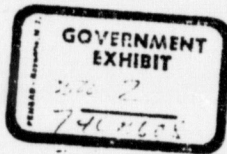


3

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Statement of Sharon Sharabi taken on September 21, 1974 (Government Exhibit 3500-2)	A-1
Grand Jury Testimony (excerpts) of Sharon Sharabi dated October 1, 1974 (Government Exhibit 10)	A-5
Letter dated January 15, 1975 from Israeli Consulate General to Carol B. Amon, Assistant United States Attorney (Government Exhibit 11)	A-9
Transcript of Proceedings of January 16, 1975 (excerpt)	A-10
Unpublished Memorandum and Order in <i>United States v. Innis</i> , EDNY, 74 CR 791 (Orrin G. Judd; April 9, 1975)	A-27



THE FOLLOWING STATEMENT WAS TAKEN
ON SEP 21, 1974. Sharon Sharabi

I Sharon Sharabi, have been advised
of my constitutional rights, AND
I understand them + wish to waive
advise of counsel at this time +
I made this statement voluntarily
+ without any promises being made
to me by Agents of DEA or
anyone else.

~~APRIL~~ 1974 my husband left
The United States, to Brazil.
Before leaving my husband told me
he would send me a table.
and told me when the table arrived
to call his friend Arie. Also
known to me as Edie, to tell him
that the table had arrived + for
Arie to pick it up. On Sept 20, 1974
I received a notification from Arie
Frank, that a table had arrived.
For me. I called Arie, also known
as Edie that the table had
arrived. Arie came to my apartment
that same night + saw the papers

ONLY COPY AVAILABLE

That I had gotten from Air France. Arie came to my house with another man he told me he would pick up the table tomorrow with me.

On Sept 21, 1974 Arie met me in front of my house and told me he had things to do. He gave me \$1800 + told me to get the table myself & the money was to be used as taxi, food & any exp. needed to get the table, ~~that~~

He then drove me Bay Pkwy & St ST at which location I got into a cab & went to Bldg # 83 pt JFK Airport, I ^{presented} ~~gave~~ the paper to get the table.

The table was inspected by customs officer at which time a white powder was found in the table which the customs officer claimed to be suspected cocaine, which I did not know ~~that~~ was in the table. The customs officer arrested me & ~~arrested~~ ^{deprived} of my constitutional rights.

THIS STATEMENT WAS TAKEN ON 5/21/1974

⑤

Sharon Sharabi

Shortly AFTER a special agent from
 the drug enforcement administration
 presented himself to me & he advised
 of my rights. The agent asked me
 if I understood my rights, and
 I said yes. The agent asked me if
 I answer questions & I said yes.
 I told the agents ~~of the~~ ^{the} how I
 got involved in picking up the table
 & that I did not know that it
~~the~~ contained narcotics. I told
 the agent that my husband's friend
 Arnie had sent me with the
 bed the table & that he would be
 coming to my house at night
 to pick the table together. I agreed
 to go with the agents to my house
 with the table & wait for Arnie
 to arrive. At approx. 8:30 ~~pm~~ ^{pm} my
 husband's friend Arnie telephoned me
 & asked if I had the table & if
 everything went all right to which
 I answered yes. He told me he
 would come to my house to

To put the table together. AT PROX
9:00 PM my husband's friend Arie
arrived with the same friend that
had arrived the night before,
they went to the table & Arie
asked me to go & make tea
as I walked to the kitchen
I saw Arie's friend take the
package from under the ~~table~~
table, & put it in a shopping
bag which he carried into
my ~~the~~ apartment. And I then
saw Arie put ~~the~~ back the piece
to the table which contained the
bag which Arie friend put in
the shopping bag. I then saw
the agents come from my bed
room into the living room & arrest
Arie & his friend.

Sharon I. Harabie

1
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 ----- X

5 UNITED STATES OF AMERICA

6 -against-

Criminal Folder

7 ARIE D. LEVY, NURIEL NURIELI
8 and ARIE SHARABI

No. 743,260

9 ----- X

10
11 GRAND JURY MINUTES

12 October 1, 1974

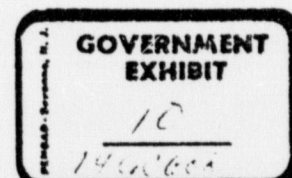
13 225 Cadman Plaza East
14 Brooklyn, New York

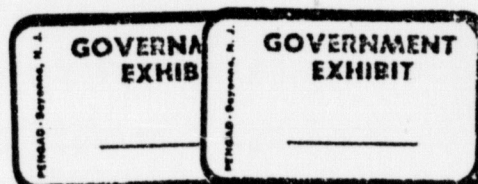
15
16 Presented By: ANTHONY T. ACCETTA, ESQ.,
17 Assistant U.S. Attorney

18
19
20 Reported By: Elizabeth A. Ng

21
22
23 Witness:

24 SHARON SHARABI





Q Then what happened.

A Then after that Arie Levy told me to go into the kitchen and make coffee or tea. As I was walking in the kitchen, I said I don't know if I had any and I turned around halfway and I saw Arie Levy moving the box under the table.

Q What else did you see?

A And pulling out the package.

Q Can you describe the package that you saw?

A It was a long plastic bag with white powder in it.

Q Did you see Mr. Levy remove that from

1
2 the table?

3 A Yes.

4 Q Did you see him do anything with it?

5 A Yes. He threw it over to his friend Nuri
6 Nurieli. He then threw it in the shopping bag.

7 Q You say he threw it over, how far was
8 he from Mr. Nurieli?

9 A Right next to him.

10 Q What do you mean by right next to him?

11 A This far apart. (indicating)

12 Q Did he toss it in the air or did he
13 hand it to him?

14 A He just, you know, just threw it over fast.

15 Q You are gesturing with your hand.

16 A He just held it in his hand and the other one
17 grabbed it and threw it in the bag.

18 Q At that point did the agents then come
19 out of your bedroom where they were staying?

20 A Two of the agents were watching through the
21 door in the bedroom which had a broken -- which had
22 a hole in the door and they had the clothes hanging.
23 Three of them were watching through the door. The
24 door was halfway open and the light was out and one
25 of them came through the door and I had told Arie

Sharabi

19

1 Levy, I says "Do you want me to get a hammer now"
2 he said "Yes." As soon as I walked into the bedroom,
3 I told the agents. I says "They got the stuff right
4 now" and then they came running out and handcuffed
5 them and told them they were arrested.
6

7 know that there
8 we e when you went
9 do

10 A No.

11 Q Did you have any idea that there would
12 be any drugs being sent to you in that table?

13 A No.

14 MR. ACCETTA: I have no further
15 questions of Mrs. Sharabi.

16 Do any members of the Grand Jury
17 have any?

18 (No response)

19 THE FOREMAN: You are excused.

20 (Whereupon, the witness was
21 excused and withdrew.)
22
23
24
25



A

9

הקונסוליה הכללית של
ישראל בניו יורק

CONSULATE GENERAL
OF ISRAEL IN NEW YORK

800 SECOND AVENUE
NEW YORK, N. Y. 10017

OXFORD 7-5500

January 15, 1975

United States Department of Justice
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

Att: Carol B. Amon
Assistant U.S. Attorney

Dear Ms. Amon:

We acknowledge receipt of your letter of January 14, 1975.

For your information, with respect to control and issuance of Israeli passports:

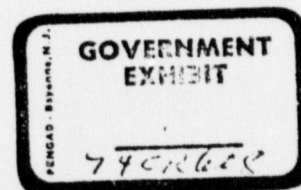
1. Israeli passports are the property of the State of Israel;
2. Israeli passports are issued originally for five years, and are extended upon request for another one to five years, with some exceptions. Israeli passports can be extended for up to ten years from the date of issue.

We hope that this answers your questions. Should you have any further questions, do not hesitate to contact us.

Sincerely yours,

R. Sivan
(Mrs.) Rivka Sivan
Consul

RS:jk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

- against -

74-CR-608

ARIE LEVY, and
MURIEL NURIELI,

Defendants.

-----x

United States Courthouse
Brooklyn, New York
January 16, 1975
10:00 o'clock a.m.

B e f o r e :

HONORABLE JOHN R. BARTELS,
U. S. D. J.

HENRI LeGENDRE
COURT REPORTER

A p p e a r a n c e s :

A 11 2

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: CAROL AMON, ESQ.,
- and -
STEVEN KIMELMAN, ESQ.,
Assistant U.S. Attorneys

RONALD WOHL, ESQ.,
Attorney for defendant Levy

JOEL WINOGRAD, ESQ.,
Attorney for defendant Nurieli.

* * * * *

1 THE CLERK: Criminal cause for trial, United
2 States against Arie Levy, Nuriel Nurieli and
3 Arie Sharabi.

4 MISS AMON: Your Honor, I'll be trying this
5 case and Mr. Kimelman, from our office, will be
6 with me.

7 THE COURT: All right, I have no comment.

8 MISS AMON: Defendant Levy is ready; defendant
9 Nurieli is ready for trial.

10 THE COURT: And the Court is ready for trial,
11 so we'll all proceed.

12 MR. WINOGRAD: I see there is a Arie Sharabi.

13 THE COURT: A bench warrant has been issued
14 for him for some time.

15 MISS AMON: He's not a defendant in this case.

16 THE COURT: But he's a fugitive.

17 MR. WOHL: We have a couple of open business,
18 if the Court please.

19 THE COURT: What is the open business?

20 MR. WOHL: I made a motion to suppress various
21 items taken from his automobile.

22 THE COURT: For instance?

23 MR. WOHL: Apparently I don't know all the
24 items that were taken.

25 THE COURT: I didn't receive -- I didn't see

1 a motion to suppress. You are just making it now?

2 MR. WOHL: I made it a couple of months ago,
3 but I made it returnable before your Honor at the
4 trial.

5 Actually, it simply gets down to this, your
6 Honor, at the time of the arrest which took place,
7 as I understand, in the Sharabi, the agents took
8 the keys of my client's car, that is Levy's car, from
9 him; went down and removed various items from his
10 car. One of those items was a laundry bag or some
11 kind of a bag; of those items are apparently airline
12 tickets and other things that I don't know about,
13 but in any event, they had no search warrant, to
14 my understanding. They had no right to go down to
15 the automobile to search and seize the items and I
16 am moving to suppress all of those items.

17 THE COURT: How did you come into it?

18 MR. WINOGRAD: I believe I don't come into it
19 at all. My client is not affected.

20 THE COURT: That's the answer.

21 MISS AMON: The Government would represent
22 nothing seized from the defendant's car would be
23 offered in the Government's direct case. There may
24 be a contention as to a laundry bag. There is a
25 laundry bag -- not actually a laundry bag -- it's a

1 shopping bag, the Government seeks to offer on its
2 direct case. The Government agent would say it was
3 not seized from the car but seized from the defendant
4 subsequent to his arrest.

5 THE COURT: What do you say?

6 MR. WOHL: Your Honor, my information is
7 otherwise, it was taken out of the car.

8 THE COURT: She made a promise to you. Do you
9 still want to suppress something that you are not
10 going to use?

11 MR. WOHL: She's not going to use it?

12 THE COURT: She's not going to use anything that
13 was taken from the car, and she says the laundry bag
14 was not taken from the car; you say it was?

15 MR. WOHL: We say it was in the car and it
16 was taken from the car, and we want to suppress it.

17 THE COURT: Let me do some talking.

18 MR. WINOGRAD: My client doesn't understand
19 what's going on.

20 THE COURT: Thank God it wasn't necessary for
21 him to know what was going on.

22 Swear in the interpreter.

23 (Whereupon, the Clerk of the Court swore in
24 an official court interpreter.)

25 MR. WOHL: As is the usual procedure, I have

1 made my motion and I have made my own affidavit just
2 for convenience sake, but I think the burden is now
3 on the Government.

4 THE COURT: We know that.

5 How many suppression hearings do you think
6 I've had?

7 MR. WOHL: Probably thousands.

8 THE COURT: I have enough work as it is.

9 Of course he knows, but I think this ought to
10 be short.

11 MR. WOHL: I have no reason to prolong it just
12 before we get started. It relates to the passport.

13 THE COURT: And you were wrong.

14 ✓ MR. WOHL: I wrote your Honor a letter.

15 THE COURT: This was not an ex parte proceeding.
16 This was sent out -- Mr. Winograd didn't show it
17 was a default on your part, but even if you were
18 there it was clearly permissible for them to have it.

19 Don't use the word ex parte. You had notice
20 and time was set. Mr. Winograd was here; the
21 Government was represented; you weren't, but you
22 wrote me a letter that it was an ex parte
23 proceeding, it was illegal.

24 Now, that was not right.

25 MR. WOHL: For the record, I would like to

1 apologize for being late. I was here half hour late;
2 number 2, my only notice was oral notice from the
3 U.S. Attorney.

4 THE COURT: You knew because you were trying
5 to get here the right time.

6 MR. WOHL: That's not a problem. My problem
7 is that the case that the U.S. Attorney brought
8 forward is a case involving an American passport.
9 This is not an American passport. An American
10 passport is the property of the United States of
11 America.

12 THE COURT: I know all about that.

13 MR. WOHL: There is no showing whatsoever --
14 there is no Israeli law --

15 THE COURT: Take it easy. Maybe it is, but
16 that doesn't mean that the passport is not available
17 to the Government.

18 If I interrupt you you're going to have time
19 to answer and reply -- all the time you want, but you
20 must let the Court make its point.

21 Now, as I understand it, how did they come into
22 here with passports, the Government let them in,
23 put a visa -- here only by permission of the Government,
24 that's all. And that permission is representative
25 by stamp on your passport and the Government has a

1 right to revoke that, haven't they; and if they had,
2 they have a right to take possession of it. It
3 happens in all countries. We are not playing games
4 here. You don't come around -- float around here
5 and be charged with a crime and then insist upon
6 maintaining your passport. You couldn't do that in
7 any other country.

8 Now, you may let me have your counter-
9 argument.

10 MR. WOHL: I couldn't agree with you more,
11 that the Court is entitled to assure itself that
12 the defendant will not leave the country.

13 THE COURT: I didn't say that. I said not
14 only take it, but can use it. Why can't they use it?

15 MR. WOHL: It's his passport, it violates his
16 constitutional rights.

17 THE COURT: What is his constitutional right?

18 MR. WOHL: Self-incrimination; it's his
19 passport.

20 THE COURT: It's not.

21 MR. WOHL: We are not talking about the
22 United States visas that are stamped in a passport.
23 We are talking about other visas in other stamps in
24 other countries. They don't belong to the United
25 States Government. The Court has a right to hold that

1 passport but the Government has no right to grab
2 it.

3 THE COURT: I get your point. How do you
4 answer it?

5 MISS AMON: Under Falley, Falley dealt with
6 an American passport.

7 THE COURT: I recall.

8 MISS AMON: In that case they said it was
9 just as much the property of the Government, dual
10 ownership.

11 Mr. Wohl says the Government has not come
12 forward and shown this is not the same --

13 THE COURT: But this is not the Israeli
14 Government, while the United States Government may
15 take a United States passport.

16 MISS AMON: He says the United States Government
17 cannot take and use an Israeli passport in a case
18 involving a criminal charge against an Israeli. I
19 think the distinction is the nature of the content
20 itself. This is not a private document of the
21 individual. In fact, your Honor, you could
22 analogize it to a blood test or anything of that
23 nature, that it's not testimonial as such. It's a
24 document that entered every entry point.

25 There are no private annotations made by defendants

1 in their passport. They are public stamps.

2 THE COURT: What right have you got to seize
3 it, though?

4 MISS AMON: Your Honor, we have the right
5 to subpoena it as any other document.

6 THE COURT: Let me see. He says you
7 certainly couldn't get any documents in his home of
8 self-incriminating nature, unless it was contraband,
9 could you?

10 MISS AMON: That's correct.

11 THE COURT: What's the difference?

12 MISS AMON: The fact is that the compelling
13 and self-incriminatory nature of this document,
14 the theory not turning over documents that are
15 self-incriminatory. They are private documents
16 belonging to the individual. We submit that a
17 passport is a very public document, and for that
18 reason, and the distinction that Mr. Wohl makes
19 with respect to the fact that the Government has not
20 shown, for instance, that the situation may be
21 different. This may be considered to be a very
22 private document of a citizen. The passport itself
23 in the first part it's written in Hebrew, which I
24 had translated probably Mr. Israel could verify
25 this passport is the property of the Government and

1 a valuable document to be looked at properly, and
2 he eliminates the distinction Mr. Wohl made in his
3 letter.

4 MR. WOHL: I'm looking at Falley right
5 now.

6 THE COURT: Forget Falley. We say it's not
7 exactly in point.

8 MR. WOHL: Falley doesn't make the kind of
9 distinction that Miss Amons makes. She's talking
10 about blood tests.

11 THE COURT: We have to talk about what is the
12 nature of this document. Let's start from the
13 beginning. Miss Amon, if there is a statement in
14 the possession of -- who do you represent?

15 MR. WOHL: Mr. Levy.

16 THE COURT: In which he has signed a confession
17 -- just so happens to himself -- can you go in and
18 get that statement?

19 MISS AMON: No, that's a private document,
20 it's very self-incriminatory in and of itself. It's
21 a self-incriminatory document and it's a private
22 document.

23 THE COURT: Under the Fifth Amendment, you
24 couldn't get it.

25 MISS AMON: That's right, your Honor.

1 THE COURT: Now, he says that this document,
2 passport, belongs to him and it has incriminatory
3 statements in it; that is what you are saying?

4 MR. WOHL: Yes.

5 THE COURT: And self-incriminatory, and you
6 have seized that illegally; and while you might
7 use it to prevent him from leaving the country, you
8 cannot cannot use it in a trial in order to
9 convict him. It belongs to the Government of
10 Israel, number one.

11 Number two, there is not inside that document,
12 simply by itself, stamps showing other places he
13 visited, several incriminating statements. There is
14 nothing self-incriminating to show, for instance,
15 that he is an Algerian or that he was in South
16 Africa or Iran, so I don't see what you are talking
17 about.

18 MR. WOHL: If your Honor please, as between
19 the Government of the United States and Mr. Levy,
20 this belongs to Mr. Levy. Miss Amon can argue all
21 she wants that it belongs to the Government of
22 Israel, it may, I don't know, but as between the
23 Government of the United States and Levy, this belongs
24 to Levy.

25 There is no question about that in my mind.

1 THE COURT: It's in his custody, that's the
2 point. We don't care as between --

3 MR. WOHL: They have no property rights to
4 it.

5 THE COURT: I don't know if he has.

6 MISS AMON: That's not the distinction that
7 we are making.

8 MR. WOHL: That's the distinction that Falley
9 makes.

10 THE COURT: Forget Falley. I'm not interested
11 in Falley. I'm interested in the reason for it.

12 MR. WOHL: If he had a notebook in his pocket --

13 THE COURT: That's not the same.

14 MR. WOHL: If he had written in the notebook
15 in his pocket, let's say, about his expenses, on
16 where he had been, and that had indicated every bit
17 as clearly as these visa stamps placed by other
18 countries, where he had been, and he had that book
19 -- that notebook in his pocket, your Honor would
20 suppress that notebook..

21 I say there is no distinction.

22 THE COURT: I said there is great distinction.
23 Nurieli's passport was an American passport?

24 MR. WINOGRAD: It was an Israeli passport.

25 THE COURT: Then they used the wrong case.

1 MR. WINOGRAD: That's correct.

2 MISS AMON: The reasoning applies here.

3 MR. WINOGRAD: The reason that Miss Amon
4 received these passports, they were in the Court's
5 possession, sealed in the Court's case. Assuming
6 that these passports --

7 THE COURT: You don't have to argue that. The
8 reason she got them was for one purpose, not for the
9 purpose of using them at the trial.

10 MR. WINOGRAD: That's correct.

11 THE COURT: You don't have to argue that at
12 all.

13 MR. WINOGRAD: Suppose they were in the house,
14 could she?

15 THE COURT: Assuming where?

16 MR. WINOGRAD: In their homes, respectively.

17 THE COURT: That's what we are arguing now,
18 as to whether or not she could.

19 MR. WINOGRAD: Would your Honor issue a
20 search warrant to Government agents to enter the
21 home of Nurieli and/or Levy for the purpose of
22 obtaining their passports?

23 THE COURT: That is not a good analogy,
24 because a search warrant can enter a home is an
25 entirely different situation where we have right in

1 the Government's possession these documents. You
2 don't have to therefore go into a house to get them
3 any more than they would if there was some other
4 statements that were in the possession of the
5 defendants which might have some relevance to the
6 trial. And they could get that by motion, not by
7 search warrant, and the question is, would I then
8 move to have the defendant surrender the passport?
9 Would I grant the motion? That's more analogous than
10 a search warrant.

11 Now, I offhand -- the only analogy we could
12 think of, I suppose, is the one that is similar
13 to granting a sample handwriting and listening to
14 the voice tape of a defendant.

15 Miss Amon mentioned blood tests. I think that
16 a document which this man must have in his possession
17 at all times is part of his own personality in
18 connection with permitted presence in this country,
19 without it he could not be here.

20 Now, what do you have to say?

21 MR. WINOGRAD: I don't believe that the
22 requirement of the Israeli Government or the United
23 States Government is that these individuals who
24 possess Israeli passports are requested to carry them
25 on their persons at all times. They have to show

1 them; whether they carry them at all times, the
2 analogy doesn't have to be absolutely perfect.

3 MR. WINOGRAD: I don't think that distinction--

4 MR. WOHL: I think I have an analogy.

5 If, instead of a passport, this was a book
6 on how to open safes and the man was charged with a
7 bank robbery and cracking a safe --

8 THE COURT: That's not a Government book and
9 it's not an analogy at all.

10 MR. WOHL: The question that he hasn't made
11 notation in it doesn't matter. The fact that he
12 has an incriminating document is what we are talking
13 about.

14 THE COURT: There is a necessary document for
15 him to be in this country. He can't be here without
16 it. No use arguing any more.

17 MR. WINOGRAD: You reserve decision?

18 THE COURT: For a couple of minutes.

19 Are you going to use it right away?

20 MISS AMON: Towards the end of the trial.

21 MR. WOHL: We have to start the suppression
22 motion on the items from the car.

23 THE COURT: I thought one was American.

24 MISS AMON: Both Israeli.

25 MR. WINOGRAD: I don't know if she indicated.

1 THE COURT: I was under the misapprehension that
2 one was an American passport.

3 MR. WOHL: I think they were sealed. She
4 wouldn't know what kind of passport it was.

5 THE COURT: You might, in the meantime, look
6 up the law.

7 MISS AMON: I think the important thing is
8 that it's a neutral document as opposed to --

9 THE COURT: Absolutely neutral document. I
10 had your argument.

11 You know sometimes you are going to get rulings
12 in favor and lots of rulings against you, and we go
13 on from there.

14 MR. WOHL: I said nothing, your Honor.

15 THE COURT: All right, decision reserved.

16 MISS AMON: Do you want something on this?

17 THE COURT: Mr. Kimelman can go up and research
18 the case.

19 * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA,

- against -

74 CR 791

RICARDO INNIS, a/k/a "Ricky,"

April 9, 1975

Defendant.

- - - - - x

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for United States of America

By: EDWARD R. KORMAN, Esq.
Chief Assistant U. S. Attorney
and
DAVID A. DePETRIS, Esq.
Assistant U. S. Attorney
of Counsel

IRA D. LONDON, Esq.
Attorney for Defendant.

J U D D, J.

MEMORANDUM AND ORDER

In connection with an indictment for conspiracy to import and distribute cocaine, there are pending three motions, one by defendant Innis to quash a subpoena served on his attorney for the production of his Panamanian passport,

another by defendant Inniss for discovery of various types, and one by the government to disqualify Ira London, Esq. from representing the defendant.

Facts

1. Mr. Inniss' passport was delivered to his attorney by his sister when the court directed its surrender as a condition for his release on bail. At the time the bail was fixed, the court permitted the passport to remain in the custody of the attorney, pending determination of the government's right to use the information it might contain.

The passport is significant to the United States, to show prior entries into the United States which may corroborate the anticipated testimony of an accomplice witness. Evidence of such entries may not be readily obtainable in other ways. Mr. Inniss is a permanent resident of the United States and has been here since 1960.

Defendant asserts that the passport is protected by the Fourth and Fifth Amendments against the production of personal papers which may tend to incriminate.

2. The discovery motion was referred to Magistrate Max Schiffman, who filed a report on March 26, 1975 disposing of all its features. No objection to his recommendations has been filed by either party.

3. A Venezuelan citizen named Manuela Cortes-Canate is expected to be the key witness against the defendant. She was arrested on June 1, 1974 at John F. Kennedy Airport in the act of bringing a kilogram of cocaine into the United States from Barranquilla, Colombia. Legal Aid Society was appointed by Magistrate Catoggio to represent her, and one of their attorneys appeared for her on June 20, 1974 and entered a not guilty plea to the indictment, which had been handed down in the meantime.

On August 16, 1974 Ira London entered a notice of appearance for Mrs. Cortes-Canate. Defendant Ricardo Inniss had been arrested in August, 1974 on a state narcotics charge, which was subsequently reduced to a misdemeanor. Mrs. Cortes-Canate says that Mr. London turned up at Rikers Island where she was confined and said that he had been retained as her attorney. He did not say who paid his fee. Mrs. Cortes-Canate being in jail, the court had set September 9 as a date.

for trial. Mr. London appeared in court on September 9 to present a motion for discovery and to ask for an adjournment. He was also present with her on September 19, 1974, when she pleaded guilty to the indictment.

Before the date for sentence, Mrs. Cortes-Canate asked that Mr. London be relieved as her counsel and that the court appoint a new attorney. She was produced in court on October 16 and questioned by the court. Legal Aid Society was then re-appointed to represent her. Mr. London was not notified of the hearing or of the appointment of counsel until the following month, because Mrs. Cortes-Canate did not want him to know of her intended cooperation with the government. She testified before the grand jury. Her sentence date was postponed pending her testimony against Mr. Inniss. She was sentenced on April 4, 1975 to 15 months imprisonment, plus three years Special Parole Term. The court directed that she continue to be held in this country as a material witness, before any deportation, even though she may have attained the time for mandatory release.

Mr. Inniss stated that he paid Mr. London a fee and wants Mr. London to represent him, and he has expressly

waived any objection to Mr. London's possible conflict of interest. Mr. London asserts that there was so little attorney-client relationship with Mrs. Cortes-Canate that he possesses no privileged communications which would be used in her cross-examination. He obtained no written statements from her.

The United States has submitted an opinion of the Committee on Professional Ethics of the Brooklyn Bar Association, rendered in another matter, that it is improper for an attorney to represent a second defendant if he also represents a co-conspirator who has pleaded guilty and is awaiting sentence, after providing information that led to the indictment of the second defendant. The Committee stated that this rule applies even though the attorney had represented the second defendant previously in other matters. Mr. London is not a member of the Brooklyn Bar Association, according to its current year-book.

The government also asserts that it may call Mr. London as a witness to testify whether Mr. Inniss paid him the retainer for his temporary representation of Mrs. Cortes-Canate.

Discussion

1. The Passport

There is no Fourth Amendment privilege for Mr. Inniss' passport, since the government could obtain a search warrant on the basis of information that the passport may contain evidence pertinent to the pending indictment.

The Fifth Amendment privilege extends to documents, if a person owns them, and has them in his possession, and they are self-incriminating. United States v. Falley, 489 F.2d 33, 41 (2d Cir. 1973). The Falley case also holds that there is no Fifth Amendment privilege for a United States passport, since it is the property of the United States by law and not that of the defendant.

The requirement of possession by the defendant is met here, even though the passport came into the possession of his sister and is now in the possession of his counsel. This is not like the possession of business and tax records by an accountant, as in Couch v. United States, 409 U.S. 322, 323, 93 S.Ct. 611, 616 (1973). In the first place, an attorney is in a different category from an accountant. In the second

place, the transfer of possession here was made while defendant was in custody and for the purpose of supporting his constitutional right to be freed on bail. Compare Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

The law of Panama as described by the government is that a passport is "a public traveling document" which may be confiscated when there is reason to believe that it has been misused in any way and which is subject to seizure by the police and is admissible in evidence when it is used in connection with a crime (Article 2056 of the Judicial Code of Panama). If the passport would be subject to seizure by the Panama police and use in evidence there, there is no injustice in permitting its use in evidence here.

Moreover, a foreign passport is not really a personal document. It is subject to inspection at the time of any entry into the United States. The provisions of 8 U.S.C. § 1182(26), cited by the government, apply only to nonimmigrants, but the regulations clearly require even permanent residents to show their passports at each entry.

At any event, an alien's passport is a type of public record, which aids in establishing his rightful presence in the United States, and therefore is outside the scope of Fifth Amendment privilege under Shapiro v. United States, 335 U.S. 1, 32, 68 S.Ct. 1375, 1391-92 (1948).

2. Discovery

The statute expressly sanctions the use of Magistrates to assist the courts in discovery in criminal matters.

28 U.S.C. § 636(b)(2). In the absence of any objections, his report should stand.

3. Disqualification

If Mr. London's testimony is necessary in this case, he should not act as trial attorney for Mr. Inniss. Code of Professional Responsibility DR5-101, 5-103.

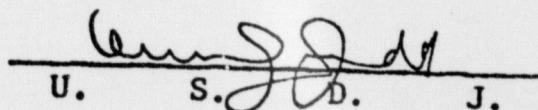
It is clear that Mr. London may be compelled to tell who paid the retainer for him to represent Mrs. Cortes-Canate. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505 (1963); United States v. Franzese, 392 F.2d 954, 963-64 (2d Cir. 1968).

The extent of Mr. London's representation of Mrs. Cortes-Canate appears to be less than that of the attorney in the Brooklyn Bar Association opinion. He did not represent her at the time she was cooperating with the government nor at her sentencing. A court should not condone a violation of the Code, but it should not interfere with the free choice of an attorney where the ethical violation is not clear. The government cites no case in which an attorney selected by a criminal defendant has been disqualified. United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) is different, since that involved the same attorney representing two defendants at the same trial.

Mr. Inniss should be given another opportunity, however, to say whether he still wants to be represented by Mr. London, given the possibility that evidence at the trial will show that he paid Mr. London to represent Mrs. Cortes-Canate before she began cooperating. Should he choose to engage other counsel, the fact that he has already paid Mr. London the fee should not be an obstacle, for the court may require a refund of the part that has not been earned.

It is ORDERED:

- (1) That the motion to quash the subpoena for defendant's passport be denied;
- (2) That the report of the Magistrate concerning the discovery motion be confirmed;
- (3) That Ira London, Esq. be directed to file an affidavit by April 11, 1975 stating who paid the retainer for him to represent Manuela Cortes-Canate, and the date and amount of the retainer, and the extent of his investigation in the matter before he submitted her guilty plea; and
- (4) That a hearing be held in the court at 10:00 A.M. on April 14, 1975, at which Mr. Inniss shall be present and state whether he still wishes to be represented by Mr. London, and that decision on the motion for disqualification be deferred until after that hearing.


U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of July 19 75 he served ^{two copies} ~~XXXX~~ a copy of the within
Government's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Ronald Wohl, Esq.

Joel Winograd, Esq.

1350 Avenue of the Americas

205 W. 34th Street

New York, N. Y. 10019

New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to-before me this

3rd day of July 19 75

IRENE S. COHEN (REVILACQUA)

Notary Public, New York

No. 1

5

County

Comm-

March 30, 1977

IRENE S. COHEN (REVILACQUA)

Notary Public, State of New York

No. 24-0583965

Qualified in Kings County

Commission Expires March 30, 1977.